

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LISA SULLY, as Personal Representative of
the Estate of JENNY LYNN BORELIS,
deceased; KIMBERLY BUSH, as Personal
Representative of the Estate of DANIEL D.
BUSH, deceased

Plaintiffs,

v.

COWLITZ COUNTY, a political subdivision
of the State of Washington; MARIN FOX
HIGHT, in her official capacity; and JOHN
DOES 1-5

Defendants and Third-
Party Plaintiffs

v.

CONMED, INC.,

Third-Party Defendants.

CASE NO. C14-5672 BHS

ORDER DENYING PLAINTIFFS'
MOTION TO STRIKE THIRD
PARTY COMPLAINT

This matter comes before the Court on Plaintiffs Kimberly Bush and Lisa Sully's ("Plaintiffs") motion to strike third-party complaint (Dkt. 22). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby denies the motion for the reasons stated herein.

I. PROCEDURAL HISTORY

On August 25, 2014, Plaintiffs filed a complaint against Defendants Cowlitz Count and Marin Fox Hight ("Defendants"). Dkt. 1. On October 2, 2014, Defendants filed an amended

1 answer and third-party complaint against Third-party Defendant ConMed, Inc. (“ConMed”).
 2 Dkt. 11. Defendants assert a contractual indemnity claim against ConMed. *Id.*

3 On October 21, 2014, Plaintiffs filed a motion to strike the third-party complaint. Dkt.
 4 22. On November 3, 2014, Defendants and ConMed responded. Dkts. 24 & 26. On November
 5 7, 2014, Plaintiffs replied. Dkt. 27.

6 II. DISCUSSION

7 As a threshold matter, Plaintiffs have improperly asserted new arguments in their reply.
 8 Submission of arguments or evidence for the first time upon reply is improper because it unfairly
 9 deprives the non-movant of an opportunity to respond. *See Provenz v. Miller*, 102 F.3d 1478,
 10 1483 (9th Cir. 1996). Plaintiffs’ opening brief was based solely on Fed. R. Civ. P. 14 and
 11 Washington statutes regarding contribution. *See* Dkt. 22. In their reply, Plaintiffs advance
 12 arguments regarding the borrowed servant doctrine and nondelegable duties. *See* Dkt. 27 at 4–7.
 13 Therefore, the Court will *sua sponte* strike Plaintiffs’ new arguments because they were
 14 improperly presented.

15 With regard to the merits of the motion, a “defending party may, as third-party plaintiff,
 16 serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the
 17 claim against it.” Fed. R. Civ. P. 14(a). “[A] third-party claim may be asserted only when the
 18 third party’s liability is in some way dependant on the outcome of the main claim and the third
 19 party’s liability is secondary or derivative.” *United States v. One 1977 Mercedes Benz*, 708 F.2d
 20 444, 452 (9th Cir. 1983).

21 In this case, the application of the test is fairly straightforward. ConMed, the third party,
 22 is allegedly liable if Defendants are liable, and ConMed’s liability is derivative of Defendants’

1 liability pursuant to contract. These facts fall squarely within the test for a third-party complaint.
2 Therefore, the Court denies Plaintiffs' motion.

3 To the extent Plaintiffs argue that Washington state law applies, the Court disagrees. "It
4 is of no import that the defendants' liability is premised upon a federal statute, and the liability of
5 the third party defendants is derived from state law." *Banks v. City of Emeryville*, 109 F.R.D.
6 535, 540 (N.D. Cal. 1985) (citing *Kennedy v. Pennsylvania Railroad Co.*, 282 F.2d 705 (3rd
7 Cir.1960) (original complaint based on Federal Employers' Liability Act and third party
8 complaint based on various state law claims)). Moreover, this is not an issue of joint and several
9 liability as Plaintiffs contend, this is an issue of indemnity. Therefore, even if the Washington
10 statutes regarding the right to contribution governed the question presented, they are not
11 applicable to the claims asserted. This is an independent reason to deny Plaintiffs' motion.

11 III. ORDER

12 Therefore, it is hereby **ORDERED** that Plaintiffs' motion to strike third-party complaint
13 (Dkt. 22) is **DENIED**.

14 Dated this 19th day of November, 2014.

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BENJAMIN H. SETTLE
United States District Judge